

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Gabriel S.,

Claimant,

v.

Inland Regional Center,

Service Agency.

Case No. 2010071125

**DECISION**

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino on March 17, 2011.

The Inland Regional Center (IRC) was represented by Jennifer Cummings, Program Manager, Appeals and Fair Hearings.

Gabriel S. (Gabriel or claimant) was represented by Steven Figueroa, his parent representative. Gabriel and his parents were present throughout this administrative proceeding.

The matter was submitted on March 17, 2011.

**ISSUES**

1. Is Gabriel eligible to receive regional center services and supports as a result of a diagnosis of autism?
2. Is Gabriel eligible for regional center services because he is mentally retarded?

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. On June 9, 2010, claimant filed a Fair Hearing Request to appeal from IRC's determination that he was not eligible for regional center services.

2. On March 17, 2011, the record was opened, jurisdictional documents were presented, documentary evidence was received, sworn testimony and closing arguments were given, the record was closed, and the matter was submitted.

### *Diagnostic Criteria for Mental Retardation*

3. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) established diagnostic criteria to determine mental retardation and learning disabilities. In order for there to be a diagnosis of mental retardation, the individual must:

(1) have "significantly subaverage intellectual functioning (an IQ of approximately 70 or below)<sup>1</sup>;

(2) have concurrent deficits or impairments in present adaptive functioning (the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and

(3) have the onset of the condition before the age of 18 years.

The DSM also established criteria for diagnosing a "learning disability." To have that diagnosis, the "individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression" must be "substantially below that expected of age, schooling, and level of intelligence." The learning problems must "significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills." "Substantially below" is usually defined as a discrepancy of more than two standard deviations between achievement and IQ.

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<sup>1</sup> "Mild Mental Retardation" is diagnosed with an IQ level between "50-55 to approximately 70."

## *Diagnostic Criteria for Autism*

4. “Autism” is a neurodevelopmental syndrome defined by severe deficits in social reciprocity, impaired communication and unusual restricted, repetitive behaviors. Autism has been conceptualized as a spectrum disorder under the diagnostic umbrella of Pervasive Developmental Disorder. Under this umbrella are more specific diagnoses: Autistic Disorder, Asperger Disorder, Pervasive Developmental Disorder – Not Otherwise Specified, Rett Disorder, and Childhood Disintegrative Disorder. Distinctions among the autism spectrum disorders basically depend upon the degree of language deficit, general cognitive delay and/or the severity of the social or behavioral symptoms. An individual must have a DSM-IV diagnosis of “autistic disorder” to qualify for regional center services.<sup>2</sup>

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<sup>2</sup> Official Notice is taken that the DSM-IV criteria for a diagnosis of “Autistic Disorder” are:

( I) A total of six (or more) items from (A), (B), and (C), with at least two from (A), and one each from (B) and (C)

(A) qualitative impairment in social interaction, as manifested by at least two of the following:

1. Marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction
2. Failure to develop peer relationships appropriate to developmental level
3. A lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)
4. A lack of social or emotional reciprocity (note: in the description, it gives the following as examples: not actively participating in simple social play or games, preferring solitary activities, or involving others in activities only as tools or "mechanical" aids)

(B) qualitative impairments in communication as manifested by at least one of the following:

1. Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
2. In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
3. Stereotyped and repetitive use of language or idiosyncratic language
4. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

### *Evidence Presented At Hearing*

5. IRC conducted a psychological assessment on April 27, 2010. Gabriel's IQ scores were in the borderline to low average range. His Autism Diagnostic Observation Schedule (ADOS) was five, far below the autism cut off score of 12. Testing on the Childhood Autism Rating Scale (CARS) indicated that he was not autistic. His Vineland adaptive behavior scores were in the borderline to low average range. Gabriel had a history of speech and developmental delays, most likely due to drug exposure in utero with his birth mother. Gabriel was diagnosed with rule out attention deficit/hyperactivity disorder (ADHD) and borderline intellectual functioning. His test scores demonstrated that he was neither autistic nor mentally retarded, but he suffered from behavioral issues. A consultation with a neurologist or psychologist was recommended to confirm an ADHD diagnosis, as were behavioral intervention services.

6. Gabriel's January 5, 2010, psycho-educational assessment noted that his cognitive skills on testing were in the borderline range. His academic skills were in the low, low average and average ranges. Behavioral testing resulted in scores in the borderline and efficient range. Gabriel had difficulty interacting with peers and was quickly irritated by them. Gabriel exhibited hyperactive, aggressive and inattentive behaviors in all environments. Test results on tests designed to identify and diagnose autism demonstrated that Gabriel's teacher thought it was unlikely that Gabriel was autistic, but his parents

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(C) restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

1. Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
2. Apparently inflexible adherence to specific, nonfunctional routines or rituals
3. Stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
4. Persistent preoccupation with parts of objects

(II) Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years:

(A) social interaction

(B) language as used in social communication

(C) symbolic or imaginative play

(III) The disturbance is not better accounted for by Rett Disorder or Childhood Disintegrative Disorder

thought autism was possible. Gabriel was determined to be speech and language impaired with ADHD.

7. A January 30, 2010, speech and language assessment conducted by the school district determined that Gabriel's speech skills were within the normal limits with easily intelligible speech and age-appropriate articulation.

8. A January 17, 2009, occupational therapy evaluation<sup>3</sup> documented that Gabriel readily complied with all test requirements for the first 40 minutes and demonstrated spontaneous and appropriate eye contact. He initiated a social greeting and demonstrated a very good affect. He engaged in limited social conversations. Gabriel's teacher reported that Gabriel had no friends in the classroom, which she attributed to his aggressive and angry behavior. He continued to struggle with social relationships. Gabriel's tolerance when frustrated was poor. He gave up quickly when he perceived a task was too challenging. As a result of interventions, Gabriel was barely able to comply with his writing assignments. He spontaneously implemented strategies he learned during therapy.

9. Gabriel's Individualized Education Program (IEP) documented that his eligibility for special education services was due to a primary disability of autism. However, the evidence did not establish that claimant had been diagnosed pursuant to DSM-IV criteria to reach that diagnosis. Eligibility for Education Services under the Education Code does not establish, by itself, eligibility for regional center services. Gabriel exhibited hyperactive, aggressive and inattentive behaviors that were consistent with a diagnosis of ADHD. Current intelligent testing was measured in the borderline range, which was inconsistent with a diagnosis of mental retardation. Behaviors consistent with autism were not seen across all environments, making it unlikely that Gabriel had autism. Gabriel made progress in his behavioral goals.

10. In April 30, 2007, a psycho-educational report documented that Gabriel's IQ scores were in the borderline range. Socially, Gabriel was generally cheerful; he played with other children willingly. Sharing was still an issue, but he used his words if prompted to do so. He sulked if the teacher corrected his behavior, but he did not stay gloomy for long. Speech and language difficulties were documented. There were no behavioral, social or emotional functioning concerns. Taken together, the test results documented that Gabriel was cognitively functioning in the average range.

11. A December 5, 2005, psycho-educational report documented that IQ testing ruled out a diagnosis of mental retardation. Gabriel was observed to be a friendly and personable child. Rapport was easily established and Gabriel was attentive to the testing materials. His adaptive functioning was in the delayed to borderline range. It was determined that Gabriel was not eligible for special education services.

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<sup>3</sup> The fine motor skills portion of the test referenced scores from another student calling that portion of the test into question.

12. A two paragraph November 10, 2010, letter written by Lina Shuhaibar, M.D., a diplomat of the American Board of Psychiatry and Neurology, stated that she is Gabriel's treating physician; that she has been treating autistic children since 1996; that she specializes in autism, ADHD and mental retardation; and that she is considered an expert in those fields. She diagnosed Gabriel was autistic disorder, ADHD, clinical mental retardation and encopresis. Dr. Shuhaibar stated that Gabriel needs an IQ test to assess his level of mental retardation, a statement that brought her diagnosis of mental retardation into question. No test results were provided to support the diagnoses set forth in Dr. Shuhaibar's letter.

13. A note from Stanley Schwartz, M.D., which was written on a prescription pad, stated that Gabriel has been seen by pediatric neurologist and that Gabriel has an autistic disorder. No further information was provided.

14. A report from Stephen Ashwal, M.D., a professor of pediatrics and neurology at Loma Linda University health care stated, "I believe that Gabriel has an autistic disorder," but Dr. Ashwal did not want to put Gabriel on medication until Gabriel underwent "a thorough evaluation by the school psychologist or the Inland Regional Center to do autism rating scales to try to confirm the diagnosis of autistic disorder." Dr. Ashwal's letter did not establish that Gabriel was diagnosed with autism.

15. Gabriel's December 2010 IEP stated that Gabriel had made great strides toward his goals and was a "model student and encourages others to be the same." Gabriel's behavior was reported to be significantly improved since last year. He reportedly listened to peers and presented his opinions when he was involved in a disagreement, worked hard to follow all directions, and encouraged others to follow suit.

16. Gabriel's mother testified about her son's difficulties and how he sits and doodles for hours. A sheet of paper containing those doodles was received in evidence. Gabriel's behavior during his hearing was observed. He sat quietly, entertained himself with doodling and what appeared to be an electronic device, whispered appropriately when he needed to advise his mother he had to go the bathroom, asked during a break if the hearing was almost over because he was hungry, and stated that he wanted to go to school to play with his friends. He also asked this administrative law judge how the electronic recording device worked.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

*Statutory Authority*

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 *et seq.*

3. Welfare and Institutions Code section 4501 states:

“The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.”

4. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

5. California Code of Regulations, title 17, section 54000 provides:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

6. California Code of Regulations, title 17, section 54001 provides:

“(a) ‘Substantial disability’ means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:



- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

#### *Appellate Authority*

7. The purpose of the Lanterman Act is to provide a “pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.” (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

8. The Lanterman Act enumerates legal rights of persons with developmental disabilities. A network of 21 regional centers is responsible for determining eligibility, assessing needs and coordinating and delivering direct services to individuals with developmental disabilities and their families within a defined geographical area. Designed on a service coordination model, the purpose of the regional centers is to “assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” The Department of Developmental Services allocates funds to the centers for operations and the purchasing of services, including funding to purchase community-based services and supports. (*Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 682-683.)

*Evaluation*

9. Gabriel does not have a diagnosis of mental retardation. His IQ scores do not support that diagnosis. A preponderance of the evidence did not establish that Gabriel that he has a diagnosis of mental retardation.

10. Gabriel does not have a diagnosis of autism. Gabriel's IEP records and reports did not establish a DSM-IV autism diagnosis. In fact, those school records reflected Gabriel's increasing social skills and a social awareness that was directly contrary to that diagnosis.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports is denied. Claimant is not eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act. He does not possess a qualifying diagnosis of either mental retardation or autism.

DATED: April 4, 2011

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MARY AGNES MATYSZEWSKI  
Administrative Law Judge  
Office of Administrative Hearings

**NOTICE:**

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**